UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NIXON CABRERA, et al., Plaintiffs, -against- 1560 CHIRP CORP. (d/b/a CHIRPING CHICKEN), et al., Defendants.	15cv8194 (TPG) (DF) **REPORT AND RECOMMENDATION**

TO THE HONORABLE THOMAS P. GRIESA, U.S.D.J.:

Currently before this Court, in this action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, and the New York Labor Law ("NYLL"), Sections 190 *et seq.* and Sections 650 *et seq.*, is a motion for a default judgment and attorneys' fees and costs brought by plaintiffs Nixon Cabrera ("Cabrera"), Rigoberto Pina Salas ("Salas"), and Victor Angel Benitez ("Benitez") (collectively, "Plaintiffs") against defendants 1560 Chirp Corp. (d/b/a Chirping Chicken) (the "Corporate Defendant"), and Kalli Karalexis ("Karalexis") (collectively, "Defendants").[1] For the reasons that follow, I recommend that Plaintiffs' motion (Dkt. 21) be granted, and that a default judgment be entered against Defendants, holding them jointly and severally liable to Plaintiffs for the amounts set out below, for unpaid minimum wages, overtime, spread-of-hours pay, statutory wage-statement and wage-notice damages, and liquidated damages, plus pre-judgment interest. I further recommend that attorneys' fees and costs not be awarded in this case, except for the filing fee reflected on the Court's Docket.

[1] The Complaint also names a "John Doe" defendant who, to this Court's understanding, has never been identified, and against whom Plaintiffs have not sought a default judgment. Accordingly, this Report and Recommendation does not address Plaintiffs' claims against this defendant.

BACKGROUND

This action was filed on Plaintiffs' behalf by the law firm of Michael Faillace & Associates, P.C. (the "Faillace Firm"), as a related case to one previously commenced in this Court by the same firm, on behalf of a number of other plaintiffs who were allegedly employed by the same individual defendant, Karalexis, and a different corporate entity, said to have been operating the same restaurant where Plaintiffs in this case worked.[2] *See Flores v. Chirping Chicken NYC Inc*., 14cv1594 (TPG) (S.D.N.Y.). Although the specific periods of employment, work schedules, and pay differed for the individual employees named as Plaintiffs in the two actions, the general allegations of the two Complaints are otherwise largely identical. The *Flores* case, however, was more actively litigated, as defendant Karalexis appeared in that action, but then repeated failed to cooperate in discovery, leading to court conferences and repeated intervention, until, after her finally conducted deposition, she apparently decided to abandon her defense of the claims against her. In contrast, Karalexis never appeared in this case, and this case thus moved immediately to the default stage. This may explain why, as set out further below, the Faillace Firm has not made any application in this case for fees and costs, whereas the firm did make such an application in the *Flores* case, in which it moved for a default judgment on the same day that it made the same type of motion here.

[2] Specifically, in the *Flores* action, plaintiffs alleged that the corporate entity Chirping Chicken NYC Inc., doing business as "Chirping Chicken," operated two restaurants by that name, including one located at 1560 Second Avenue, New York, NY 10028. In this action, brought by Plaintiffs whose employment periods all post-date the employment periods of the *Flores* plaintiffs, Plaintiffs proceed against the corporate entity 1560 Chirp Corp., also alleged to be doing business as "Chirping Chicken" at the 1560 Second Avenue address. This Court assumes that Plaintiffs in this action have a good-faith basis for proceeding against 1560 Chirp. Corp., either as a successor entity to Chirping Chicken NYC Inc. or a new owner of the Chirping Chicken business.

In any event, this Court is issuing a separate Report and Recommendation in each case, separately discussing the factual and procedural history of each, the amount of damages to which each Plaintiff is due as a result of Defendants' defaults, and the extent to which fees and costs should be awarded.

A. Factual Background

Given the entry of default against Defendants, the well-pleaded allegations contained in the Complaint in this case, dated October 17, 2015 ("Compl.") (Dkt. 1), are deemed to be true, except for those allegations relating to damages. (*See* Discussion *infra*, at Section I(B); *see also*, *e.g.*, *Santillan v. Henao*, 822 F. Supp. 2d 284, 290 (E.D.N.Y. 2011).) The facts included in this Report and Recommendation are taken from that Complaint, and, where particularly applicable, from Declarations that have now been submitted by each of the Plaintiffs.[3]

Plaintiffs plead in their Complaint that they are all former employees of Defendants, who, Plaintiffs maintain, "own, operate, and/or control" a restaurant in Manhattan, under the name "Chirping Chicken," located at 1560 Second Avenue, New York, NY 10028. (Compl. ¶¶ 1-2, 28.) Defendant Karalexis is alleged to have had operational control and/or an ownership interest in the Corporate Defendant, and to have determined Plaintiffs' wages, established their schedules, maintained employee records, and had the authority to hire and fire employees. (*Id.* ¶¶ 23-24, 29.) According to the Complaint, Defendants, at all relevant times, "both separately and jointly, had a gross annual volume of sales of not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated)." (*Id.* ¶ 36.) The Complaint also alleges, upon information and belief, that "Defendants and/or their enterprise were directly engaged in

[3] See Declaration of Nixon Cabrera, dated July 27, 2016 ("Cabrera Decl.") (Dkt. 24); Declaration of Rigoberto Pina Salas, dated Aug. 15, 2016 ("Salas Decl.") (Dkt. 25); and Declaration of Victor Angel Benitez, dated Aug. 5, 2016 ("Benitez Decl.") (Dkt. 26).

interstate commerce," by, for example, using and selling goods, such as "meats, beverages and cleaning supplies," that were produced outside of New York State. (*Id.* ¶ 37.)

Based on the Complaint, Plaintiffs were all "ostensibly employed by [D]efendants as delivery workers," although, in addition to performing delivery services, they were also required – for an equal or greater amount of time – to engage in "non-tip/non-delivery duties, such as washing dishes, washing the kitchen, receiving and carrying deliveries upstairs and stocking them around the stock room, and bringing up ice from the basement." (*Id.* ¶¶ 3-4, 7, 38.) The Complaint alleges that, despite the time they had to spend doing non-tipped work, Plaintiffs were unlawfully paid by Defendants at a lowered "tip credit" rate of pay. (*Id.* ¶¶ 7-9.) Plaintiffs also allege that, at all relevant times, "Defendants maintained a policy and practice of requiring Plaintiffs . . . to work in excess of forty (40) hours per week without providing the [required] minimum wage and overtime compensation." (*Id.* ¶ 12; *see also id.* ¶ 5.) Plaintiffs further allege that Defendants failed to pay them the "spread of hours" pay required by New York State law for any days in which they worked over 10 hours per day. (*Id.* ¶ 6.)[4]

The allegations of the three individual Plaintiffs, with respect to the particular hours they worked and the pay they received, are set forth in greater detail below, in connection with this Court's assessment of their claimed damages.

B. Procedural History

Plaintiffs filed their Complaint in this action on October 17, 2015. (Dkt. 1.) Plaintiffs served a Summons and the Complaint on the Corporate Defendant on October 23, 2015 and on

[4] Although Plaintiffs also allege in the Complaint that they were required "to purchase clothing and equipment necessary for their jobs at [their] own expense" (Compl. ¶ 11; *see also id.* at ¶¶ 57, 78, 98), they make no reference in their damages submissions to such expenses, and, apparently, they are not seeking to include reimbursement for such expenses in the default judgment.

defendant Karalexis on October 27, 2015. (Dkts. 11, 12.) Neither of the Defendants answered, moved, or otherwise responded to the Complaint, and, on July 28, 2016, Plaintiffs requested that Defendants be found in default, so that Plaintiffs could move forward with a motion for a default judgment. (Dkt. 15.) On August 5, 2016, the Clerk of Court duly issued Certificates of Default as to both the Corporate Defendant and Karalexis. (Dkts. 17, 18.)

After requesting and receiving two extensions of time to file a motion for a default judgment (Dkts. 16, 20), Plaintiffs filed their motion against both Defendants on August 19, 2016 (*see* Dkt. 21 (Notice of Plaintiffs' Motion for Default Judgment, dated Aug. 19, 2016 ("Notice of Motion")); Dkt. 22 (Declaration of Joshua S. Androphy in Support of Plaintiffs' Motion for Default, dated Aug. 19, 2016 ("Androphy Decl.")); Dkt. 23 (Memorandum of Law in Support of Plaintiffs' Application for Default Judgment, dated Aug. 19, 2016 ("Pl. Mem.")); Dkts. 24-26 (Cabrera, Salas, and Benitez Decls.)). On November 1, 2016, the Honorable Thomas P. Griesa, U.S.D.J., referred the motion to this Court for a report and recommendation. (Dkt. 27.)

To date, neither the Corporate Defendant nor Karalexis has filed any opposition.

DISCUSSION

I. APPLICABLE LEGAL STANDARDS

A. Default Judgment

Rule 55(a) of the Federal Rules of Civil Procedure provides that the Clerk of Court shall enter a default against a party who "has failed to plead or otherwise defend" in an action. Fed. R. Civ. P. 55(a). Local Civil Rule 55.1 of this Court further provides that a party who applies for a certificate of default by the Clerk pursuant to Fed. R. Civ. P. 55(a) "shall submit an affidavit showing (1) that the party against whom a notation of default is sought is not an infant, in the military, or an incompetent person; (2) that the party has failed to plead or otherwise defend the action; and (3) that the pleading to which no response has been made was properly served." Local Civ. R. 55.1. Once a certificate of default has been issued by the Clerk pursuant to Rule 55(a) and Local Civ. R. 55.1, then, upon application of the party seeking judgment by default, the Court may proceed to enter a default judgment against the defaulting party. Fed. R. Civ. P. 55(b).

While "default is an admission of all well-pleaded allegations against the defaulting party," *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 246 (2d Cir. 2004); *see also Finkel v. Romanowicz*, 577 F.3d at 79, 84 (2d Cir. 2009) (noting that, where a defendant has defaulted, the well-pleaded allegations of the complaint are deemed to be true), a court is still "'required to determine whether the [plaintiff's] allegations establish [the defendant's] liability as a matter of law,'" *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011) (alteration in original; quoting *Finkel*, 577 F.3d at 84); *accord Taizhou Zhongneng Import & Export Co. v. Koutsobinas*, 509 F. App'x 54, 56 (2d Cir. 2013) (summary order). "If the complaint fails to state a cognizable claim, a plaintiff may not recover even upon defendant's default." *Allstate Ins. Co. v. Afanasyev*, No. 12cv2423 (JBW) (CLP), 2016 WL 1156769, at *6 (E.D.N.Y. Feb. 11, 2016) (citing *Finkel*, 577 F.3d at 84), *report and recommendation adopted*, 2016 WL 1189284 (Mar. 22, 2016).

Further, although a "default judgment entered on well-pleaded allegations in a complaint establishes a defendant's liability," *Bambu Sales, Inc v. Ozak Trading, Inc.*, 58 F.3d 849, 854 (2d Cir. 1995) (internal quotation marks and citation omitted), it does not reach the issue of damages, *see Ferri v. Berkowitz*, 561 F. App'x 64, 65 (2d Cir. 2014) (summary order) (citing *Transatl. Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 111 (2d Cir. 1997)). A plaintiff must therefore substantiate his claim for damages with admissible evidence to prove the extent of those damages. *See Hounddog Prod., L.L.C. v. Empire Film Grp., Inc.*, 826 F. Supp. 2d 619, 627 (S.D.N.Y. 2011) (citing *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992)). A plaintiff bears the burden to "introduce sufficient evidence to establish the amount of damages with reasonable certainty." *RGI Brands LLC v. Cognac Brisset-Aurige, S.A.R.L.*, No. 12cv01369 (LGS) (AJP), 2013 WL 1668206, at *6 (S.D.N.Y. Apr. 18, 2013), *report and recommendation adopted*, 2013 WL 4505255 (Aug. 23, 2013). Although a plaintiff is entitled to all reasonable inferences in his favor based upon the evidence submitted, *see U.S. ex rel. Nat. Dev. & Const. Corp. v. U.S. Envtl. Universal Servs., Inc.*, No. 11cv730 (CS), 2014 WL 4652712, at *3 (S.D.N.Y. Sept. 2, 2014) (adopting report and recommendation), if a plaintiff fails to demonstrate its damages to a reasonable certainty, then the court should decline to award any damages, even where liability has been established through default, *see Lenard v. Design Studio*, 889 F. Supp. 2d 518, 538 (S.D.N.Y. 2012) (adopting report and recommendation).

While the Court may hold a hearing to assess the amount of damages that should be awarded on a default, *see* Fed. R. Civ. P. 55(b)(2) (court may conduct hearings on damages as necessary), the Second Circuit has consistently held that "[b]y its terms, [Rule] 55(b)(2) leaves the decision of whether a hearing is necessary to the discretion of the district court," *Fustok v. ContiCommodity Servs., Inc.*, 873 F.2d 38, 40 (2d Cir. 1989); *accord Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51, 54 (2d Cir. 1993) (judges are given much discretion to determine whether an inquest hearing need be held); *Action S.A. v. Marc Rich & Co.*, 951 F.2d 504, 508 (2d Cir. 1991) (Rule 55(b)(2) "allows but does not require . . . a hearing").

B. Burden of Proof in Wage Cases, Where Defendants' Records Are Inadequate or Have Not Been Produced

In an FLSA case, the burden falls on the plaintiff-employee to demonstrate "'that he performed work for which he was not properly compensated.'" *Santillan*, 822 F. Supp. 2d at 293-94 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); *superseded on other grounds by* The Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251, *et seq.*). As noted by the Supreme Court, however, employees "'seldom keep . . . records [of hours worked] themselves,'" *id*. at 294 (quoting *Anderson*, 328 U.S. at 687) (alteration in original), and, "'even if they do, the records may be and frequently are untrustworthy,'" *id*. (quoting *Anderson*, 328 U.S. at 687). Employers, on the other hand, have a duty to maintain such records pursuant to Section 11(c) of the FLSA, and, thus, the "easiest way for an FLSA plaintiff to discharge his or her burden of proof is, generally, to 'secur[e] the production of such records' from the employer." *Id.* (quoting *Anderson*, 328 U.S. at 687) (alteration in original).

A defaulting defendant that never appears or produces documents "deprive[s] the plaintiff of the necessary employee records required by the FLSA, thus hampering [the] plaintiff's ability to prove his damages." *Id.* Thus, where no wage-and-hour records have been produced, a plaintiff may meet his burden of proof "by relying on recollection alone" to establish that he "performed work for which he was improperly compensated." *Id.* at 293-94 (finding, in a default context, that plaintiff provided a "sufficient basis for [the] determination of damages" where he "submitted a sworn declaration containing information as to hours worked and rates of pay based on estimation and recollection," even where the plaintiff's submission was "general and not detailed" (internal quotation marks and citations omitted)). "Moreover, in the absence of rebuttal by defendants . . . [the employee's] recollection and estimates of hours worked are presumed to be correct." *Id.* (internal quotation marks and citations omitted); *see also Reich v. S. New*

England Telecomms. Corp., 121 F.3d 58, 67 (2d Cir. 1997) (where an employer fails to produce evidence regarding the amount of work that the employee performed or evidence to negate "'the reasonableness of the inference to be drawn from the employee's evidence,'" the court may "'award damages to the employee, even though the result be only approximate.'" (quoting *Anderson*, 328 U.S. at 687-88)).

Under New York law, courts actually "go[] one step further and require[] that employers who fail to maintain the appropriate records 'bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.'" *Santillan*, 822 F. Supp. 2d at 294 (quoting N.Y. Lab. Law § 196-a).

C. FLSA and NYLL Statutes of Limitations

Under the FLSA, the applicable statute of limitations is two years, although it is extended to three years upon a finding that the FLSA violations by an employer were willful. 29 U.S.C. § 255(a).[5] The applicable limitations period for NYLL claims is six years. N.Y. Lab. Law § 663(3).

D. Damages Available Under the FLSA and NYLL for Minimum-Wage and Overtime Pay Violations

Pursuant to the FLSA, an employee must be paid, at least, the federal statutory minimum wage for the first 40 hours that he or she worked in a given work week. 29 U.S.C. § 206(a). Moreover, an employee is entitled to be paid for overtime hours (*i.e.*, hours exceeding 40 per

[5] Willfulness under the FLSA is found where an employer "knew or showed reckless disregard for the matter of whether [the employer's] conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Although "a defendant's default, in itself, may suffice to support a finding of willfulness," *Santillan*, 822 F. Supp. 2d at 297, no Plaintiff in this case alleges that he was employed by Defendants more than two years prior to the date when the Complaint was filed, and thus the Court need not make a willfulness finding here for statute-of-limitations purposes.

week), at a "rate not less than one and one-half times the regular rate at which [the employee] is employed." *Id.* § 207(a)(1); *see also, e.g.*, *Chun Jie Yin v. Kim*, No. 07cv1236 (DLI) (JO), 2008 WL 906736, at *3 (E.D.N.Y. Apr. 1, 2008) (adopting report and recommendation and noting that "[t]he FLSA requires employers to pay their employees the statutory minimum wage as well as a premium (150 percent of the statutory minimum wage) for hours worked above 40 hours per week" (citations omitted)). A plaintiff with a successful minimum-wage claim under the FLSA is entitled to recover damages up to, but not exceeding, these statutory amounts. *See Santillan*, 822 F. Supp. 2d at 293. At all times relevant to this action, the federal minimum wage was $7.25 per hour. 29 U.S.C. § 206(a)(1)(C).

Under the NYLL, a prevailing plaintiff is entitled to recover "the full amount of wages owed, not just the statutory minimum wage for the hours worked." *Chun Jie Yin*, 2008 WL 906736, at *4; *see also* N.Y. Lab. Law § 198(3) ("All employees shall have the right to recover full wages . . . accrued during the six years previous to the commencing of such action."). Where, however, a plaintiff-employee was not owed more than the minimum wage, then the statutory rates come into play. For the periods relevant to this action, the statutory minimum wage in New York State was as follows:

As of December 31, 2013:	$8.00 per hour
As of December 31, 2014:	$8.75 per hour[6]

N.Y. Lab. Law § 652(1). The NYLL, like the FLSA, mandates payment at one and one-half times the regular rate for each hour worked by an employee in excess of 40 hours per week. 12 N.Y.C.R.R. § 146-1.4.

[6] The New York State minimum wage was raised again as of December 31, 2015, but that date was after the period of Plaintiffs' employment.

Although a plaintiff may be "entitled to recover unpaid minimum wages and overtime pay under both the FLSA and the [NYLL], [he or she] may not recover twice." *Cao v. Wu Liang Ye Lexington Rest., Inc.*, No. 08cv3725 (DC), 2010 WL 4159391, at *3 (S.D.N.Y. Sept. 30, 2010). Instead, "[w]here a plaintiff is entitled to damages under both federal and state wage law, a plaintiff may recover under the statute which provides the greatest amount of damages." *Wicaksono v. XYZ 48 Corp.*, No. 10cv3635 (LAK) (JCF), 2011 WL 2022644, at *3 (S.D.N.Y. May 2, 2011), *report and recommendation adopted*, 2011 WL 2038973 (May 24, 2011) (internal quotation marks and citation omitted). Accordingly, when calculating minimum-wage damages, the higher of either the FLSA or the New York minimum wage should be used for any period covered by both statutes. *Id.*, at *3.

E. Spread-of-Hours Pay Pursuant to the NYLL

Under the NYLL (but not the FLSA), in addition to receiving damages for unpaid regular wages and overtime, an employee is entitled to receive "spread-of-hours" pay, which is "one hour's pay at the basic minimum hourly wage rate" for any workday that lasts longer than 10 hours. 12 NYCRR § 142-2.4(a); *see also* N.Y. Lab. Law §§ 650 *et seq.* "Spread of hours compensation is calculated by multiplying the minimum wage by the number of days an employee worked more than ten hours." *Angamarca v. Pita Grill 7 Inc.*, No. 11cv7777 (JGK) (JLC), 2012 WL 3578781, at *8 (S.D.N.Y. Aug. 2, 2012), *report and recommendation adopted*, Dec. 14, 2012 (slip op.).

F. Wage-Statement and Wage-Notice Requirements

1. Wage Statements

Pursuant to New York's Wage Theft Prevention Act ("WTPA"), an amendment to the NYLL that was made effective as of April 9, 2011, employers are required to

> 'furnish each employee with a statement with every payment of wages, listing the following' information: (1) the dates of work covered by that payment of wages; (2) the employee's name; (3) the employer's name, address, and telephone number; (4) the rate or rates of pay and basis thereof; (5) gross wages; (6) deductions; (7) allowances, if any, claimed as part of the minimum wage; and (8) net wages.

Salinas v. Starjem Rest. Corp., No. 13cv2992, 2015 WL 4757618, at *13 (S.D.N.Y. Aug. 12, 2015) (quoting N.Y. Lab. Law § 195(3)); *see also Baltierra v. Advantage Pest Control Co.*, No. 14cv5917 (AJP), 2015 WL 5474093, at *10-11 (S.D.N.Y. Sept. 18, 2015).

Prior to February 27, 2015, "the WTPA entitled employees to recover statutory damages for violations of the wage statement requirement of $100 per work week, not to exceed $2,500." *Baltierra*, 2015 WL 5474093, at *10 (citation omitted); *accord Inclan v. New York Hosp. Grp., Inc.*, 95 F. Supp. 3d 490, 501 (S.D.N.Y. 2015); *see also* 2010 N.Y. Laws ch. 564 § 7, *amending* N.Y. Lab. Law § 198(1-d). By an amendment to the WTPA effective February 27, 2015, the law changed to allow employees to recover wage-statement statutory damages of $250 dollars "for each work *day* that the violations occurred or continue to occur," not to exceed $5,000. 2014 N.Y. Laws ch. 537 § 2, *amending* N.Y. Lab. Law § 198(1-d) (emphasis added); *see also* *Zhang v. Red Mtn. Noodle House Inc.*, No. 15cv628 (SJ) (RER), 2016 WL 4124304, at *6 n.13 (E.D.N.Y. July 5, 2016), *report and recommendation adopted*, 2016 WL 4099090 (Aug. 2, 2016).

2. Wage Notices

In addition, beginning April 9, 2011, the WTPA required employers to provide written wage notices "at the time of hiring, and on or before February first of each subsequent year of the employee's employment with the employer." N.Y. Lab. Law § 195(1-a) (eff. April 9, 2011 to Feb. 27, 2015). By an amendment to the WTPA, however, that provision changed, effective

February 27, 2015, to one that required employers to provide written wage notices only "at the time of hiring." 2014 N.Y. Laws ch. 537 § 1, *amending* N.Y. Lab. Law § 195(1-a). Throughout, the WTPA has required the wage notice to be "in English and in the language identified by each employee as the primary language of such employee," *id.*, and to contain the following information:

> (1) the rate or rates of pay and basis thereof; (2) allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; (3) the regular pay day designated by the employer; (4) the employer's name; (5) any 'doing business as' names used by the employer; (6) the physical address of the employer's main office or principal place of business, and a mailing address if different; (7) the employer's telephone number; and (8) such other information as the commissioner deems material and necessary.

Salinas, 2015 WL 4757618, at *13; *see also* 2014 N.Y. Laws ch. 537 § 1, *amending* N.Y. Lab. Law § 195(1-a).

Prior to February 27, 2015, "the WTPA entitled employees to recover statutory damages for wage notice violations of $50 per work week, not to exceed $2,500." *Baltierra*, 2015 WL 5474093, at *11; *accord Inclan*, 95 F. Supp. 3d at 501-02; *see also* 2010 N.Y. Laws ch. 564 § 7, *amending* N.Y. Lab. Law § 198(1-b). By an amendment to the WTPA effective February 27, 2015, employees became entitled to recover wage-notice statutory damages of $50 dollars "for each work *day* that the violations occurred or continue to occur," not to exceed $5,000. 2014 N.Y. Laws ch. 537 § 2, *amending* N.Y. Lab. Law § 198(1-b) (emphasis added); *see also Zhang*, 2016 WL 4124304, at *6 n.12.

G. Liquidated Damages Pursuant to the FLSA and NYLL

In addition to allowing recovery for unpaid minimum wages and overtime compensation, the FLSA provides for the recovery of liquidated damages. *See* 29 U.S.C. § 216(b). Under the statute, a plaintiff is entitled to recover liquidated damages in an amount equal to the amount of unpaid wages and overtime compensation that the plaintiff was improperly denied, unless the employer demonstrates that it acted in good faith and had a reasonable basis for believing that it had not violated the FLSA. *See id.* (providing that plaintiff-employees who prevail under either Section 206 or 207 of the FLSA are entitled to recover "the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and . . . an additional equal amount as liquidated damages"); *see also* 29 U.S.C. § 260 (mandating that an employer pay liquidated damages unless the employer demonstrates that he was acting in "good faith" and "had reasonable grounds for believing" that he was not acting in violation of the FLSA); *see also Galeana v. Lemongrass on Broadway Corp.*, 120 F. Supp. 3d 306, 317 (S.D.N.Y. 2014) (adopting report and recommendation).

"As the Second Circuit has observed, 'the employer bears the burden of establishing, by plain and substantial evidence, subjective good faith and objective reasonableness. . . . The burden, under 29 U.S.C. § 260, is a difficult one to meet, however, and double damages are the norm, single damages the exception.'" *See Galeana*, 120 F. Supp. 3d at 317 (quoting *Reich*, 121 F.3d at 71 (other internal quotation marks and citations omitted)); *Cao*, 2010 WL 4159391, at *5; *Yu G. Ke*, 595 F. Supp. 2d at 261; *see also* 29 U.S.C. § 260.

The NYLL also provides for the recovery of liquidated damages, *see* N.Y. Lab. Law § 663(1), and courts within this Circuit had long been split on the question of whether a plaintiff may recover liquidated damages under both the FLSA and the NYLL. *See Chowdhury v. Hamza Express Food Corp.*, No. 15-3142-cv, 2016 WL 7131854, at *1 (2d Cir. Dec. 7, 2016) (summary order) (acknowledging "split among district courts as to whether . . . 'cumulative' or 'stacked' liquidated damages awards are available"). In *Chowdhury*, the Second Circuit addressed the question, noting that, prior to 2009, the NYLL liquidated damages provision differed markedly from that of the FLSA, as it "entitled employees to liquidated damages only in the amount of twenty-five percent of wages owed, and only if the employee proved that the employer's violation of the statute was 'willful.'" *Id.* After being amended in 2009 and again in 2010, though, "the NYLL now mirrors the FLSA," entitling "employees to 'liquidated damages equal to one hundred percent of the total amount of the wages found to be due,' unless the employer 'proves a good faith basis to believe that its underpayment of wages was in compliance with the law.'" *Id.* (quoting N.Y. Lab. Law § 198(1-a); citing *id.* § 663(1).) The Second Circuit found that, "whatever reasons existed to award liquidated damages under the relevant provision of both [statutes] before 2010, . . . the subsequent amendments to the NYLL provision . . . eliminated those reasons," as "double recovery is generally disfavored where another source of damages already remedies the same injury for the same purpose." *Id.* at *2. Accordingly, the Second Circuit held that "New York's law does not call for an award of . . . liquidated damages over and above a like award of FLSA liquidated damages." *Id.* at *1.

Subsequent to the Second Circuit's decision in *Chowdhury*, courts have declined to award cumulative liquidated damages for unpaid wages on or after April 9, 2011, the effective date of the second amendment to the NYLL, which increased the amount of available liquidated damages from 25 percent of unpaid wages to 100 percent. *See Granados v. Traffic Bar & Rest.*, No. 13cv0500 (TPG) (JCF), 2016 WL 7410725, at *5 (S.D.N.Y. Dec. 21, 2016) (report and recommendation) ("As I read *Chowdhury*, it was the confluence of the two . . . amendments to the NYLL that brought it sufficiently 'in line' with the FLSA to prohibit 'stacked' liquidated damages. Therefore, 'stacked' liquidated damages are available for unpaid wages earned prior to April 9, 2011."); *see also Garcia-Devargas v. Maino*, No. 15cv2285 (GBD) (JLC), 2017 WL

129123, at *9 n.10 (S.D.N.Y. Jan. 13, 2017) (report and recommendation). For unpaid wages incurred on or after April 9, 2011, a plaintiff will not be permitted a cumulative recovery, but rather, may recover "under the statute that provides the greatest relief." *Castillo v. RV Transp., Inc.*, No. 15cv0527 (LGS), 2016 WL 1417848, at *3 (S.D.N.Y. Apr. 11, 2016) (modifying report and recommendation); *see also Morales v. Mw Bronx, Inc.*, No. 15cv6296 (TPG), 2016 WL 4084159, at *10 (S.D.N.Y. Aug. 1, 2016) (courts awarding damages under only one statute "apply whichever . . . statute results in the higher award for the plaintiff" (collecting cases)).

H. Prejudgment Interest

Generally, "[t]he decision to award prejudgment interest is discretionary, and is based on the need to fully compensate the wronged party, [the] fairness of the award, and the remedial purpose of the statute involved." *Najnin v. Dollar Mountain, Inc.*, No. 14cv5728, 2015 WL 6125436, at *3 (S.D.N.Y. Sept. 25, 2015) (citation omitted). A plaintiff who recovers liquidated damages under the FLSA, however, is not also entitled to prejudgment interest on his or her FLSA damages. *See, e.g.*, *Fermin v. Las Delicias Peruanas Rest., Inc.*, 93 F. Supp. 3d 19, 48 (E.D.N.Y. 2015) ("'It is well settled that in an action for violations of the [FLSA] prejudgment interest may not be awarded in addition to liquidated damages.'" (quoting *Begum v. Ariba Disc., Inc.*, No. 12cv6620 (DLC) (KNF), 2015 WL 223780, at *3 (S.D.N.Y. Jan. 16, 2015))). Given that FLSA liquidated damages serve a compensatory, rather than punitive, purpose, "there is no need to employ pre-judgment interest to restore Plaintiffs to a position they would have otherwise enjoyed absent the wage-protection violation." *Id.* Thus, in an action where both FLSA and NYLL claims are brought, "courts do not award statutory prejudgment interest on any portion of the recovery for which liquidated damages were awarded under the FLSA." *Andrade v. 168 First Ave. Rest. Ltd.*, No. 14cv8268 (JPO) (AJP), 2016 WL 3141567, at *9 n.7

(S.D.N.Y. June 3, 2016), *report and recommendation adopted*, 2016 WL 3948101 (July 19, 2016).

Although the NYLL's liquidated damages provision has been brought into conformity with the FLSA provision, such that courts have "held that liquidated damages under the NYLL no longer are clearly punitive," either, "a separate basis [now] applies for the award of prejudgment interest alongside a liquidated damages award" under the NYLL, namely, an express provision, added to the NYLL in 2011, "for a plaintiff to receive both types of awards." *Hernandez v. Jrpac Inc.*, No. 14cv4176 (PAE), 2016 WL 3248493, at *35 (S.D.N.Y. June 9, 2016) (citing N.Y. Lab. Law § 198(1-a)); *see also Castillo*, 2016 WL 1417848, at *3. Under the state law, "[p]rejudgment interest is calculated . . . on the unpaid wages due under the NYLL, not on the liquidated damages awarded under the state law." *Mejia v. East Manor USA Inc.*, No. 10cv4313 (NG), 2013 WL 3023505, at *8 n.11 (E.D.N.Y. Apr. 19, 2013) (citation omitted), *report and recommendation adopted*, 2013 WL 2152176 (May 17, 2013).

"Pursuant to [New York] state law, a successful plaintiff may receive prejudgment interest at a rate of nine percent per year." *Najnin*, 2015 WL 6125436, at *4; *see also* N.Y.C.P.L.R. §§ 5001, 5004. As to the date from which interest should be found to run, "Section 5001(b) sets forth two methods of calculating prejudgment interest." *Alvarez v. 215 N. Ave. Corp.*, No. 13cv049 (NSR) (PED), 2015 WL 3855285, at *3 (S.D.N.Y. June 19, 2015) (adopting report and recommendation).

> First, interest may be calculated from 'the earliest ascertainable date the cause of action existed,' N.Y. C.P.L.R. § 5001(b). However, '[w]here . . . damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.'

Id. (citation omitted). It is within the Court's "'wide discretion'" to "'determin[e] a reasonable date from which to award prejudgment interest.'" *Id.* (quoting *Conway v. Icahn & Co.*, 16 F.3d 504, 512 (2d Cir. 1994)).

I. Joint and Several Liability of "Employers" Under the FLSA and NYLL

The FLSA imposes liability on "employers," a group that is "broadly define[d] [to include] 'any person acting directly or indirectly in the interest of an employer in relation to an employee.'" *Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 342-43 (S.D.N.Y. 2005) (quoting 29 U.S.C. § 203(d)). "The definition of 'employer' is similarly expansive under New York law, encompassing any 'person employing any [employee].'" *Id.* (quoting N.Y. Lab. Law §§ 2(6)). To determine whether a party qualifies as an "employer" under both statutes' "generous definitions," the relevant inquiry is "'whether the alleged employer possessed the power to control the workers in question, . . . with an eye to the economic reality presented by the facts of each case.'" *Id.* (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999)).

"[W]hen examining the 'economic reality' of a particular situation," courts will evaluate various factors, none of which, individually, is dispositive. *Id.* These factors include "'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" *Id.* (quoting *Herman*, 172 F.3d at 139). Further, "'[t]he overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, [and is therefore] jointly and severally liable under the FLSA for unpaid wages.'"

Id. (quoting *Moon v. Kwon*, 248 F. Supp. 2d 201, 237 (S.D.N.Y. 2002), and finding defendants jointly and severally liable under both the FLSA and the NYLL).

J. Attorneys' Fees and Costs

"Under both the FLSA and the NYLL, a prevailing plaintiff may recover [his or] her reasonable attorney's fees and costs." *Najnin*, 2015 WL 6125436, at *4; *see* 29 U.S.C. § 216(b); N.Y. Lab. Law § 198(1-a). The Court has discretion to determine the amount of attorneys' fees that would be appropriate to satisfy a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). As a general matter, the "starting point" in analyzing whether claimed attorneys' fees are appropriate is "the lodestar – the product of a reasonable hourly rate and the reasonable number of hours required by the case." *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011) (lodestar calculation creates a "presumptively reasonable fee" (internal quotation marks omitted; citing *Arbor Hill*, 522 F.3d at 183, and *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010))). The party seeking fees bears the burden of demonstrating that its requested fees are reasonable, *see Blum v. Stenson*, 465 U.S. 886, 897 (1984), and must provide the Court with sufficient information to assess the fee application, *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983).

In addition to the lodestar amount, attorneys' fees may include "'those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients.'" *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir. 1998) (citation omitted). These expenses, or "costs," may include photocopying, travel, telephone costs, and postage, *Kuzma v. Internal Revenue Serv.*, 821 F.2d 930, 933-34 (2d Cir. 1987), as well as filing fees and reasonable process server fees, *Rosendo v. Everbrighten Inc.*, No. 13cv7256 (JGK) (FM), 2015 WL 1600057, at *9

(S.D.N.Y. Apr. 7, 2015), *report and recommendation adopted*, 2015 WL 4557147 (July 28, 2015).

II. PLAINTIFFS' MOTION FOR A DEFAULT JUDGMENT

By their motion, Plaintiffs seek to hold Defendants jointly and severally liable to them for violating the FLSA and NYLL, and request the entry of a default judgment against Defendants in the amount of $39,228.88, plus prejudgment interest, to be calculated through the date judgment is entered. (Androphy Decl. ¶ 12.) Plaintiffs also seek to recover an unspecified measure of attorneys' fees and costs. (*Id.* ¶ 9.)

A. Liability Under the FLSA and NYLL

Although the Clerk of Court has entered the defaults of both Defendants, this Court is still required to determine whether Plaintiffs' allegations are sufficient to establish Defendants' liability as a matter of law. *See Mickalis Pawn Shop*, 645 F.3d at 137. Upon a review of Plaintiffs' submissions, this Court finds that Plaintiffs have made a sufficient showing that Defendants were their employers and that Defendants failed to pay them required minimum wages under federal and state law, and, in the case of plaintiff Benitez, required overtime compensation and NYLL spread-of-hours pay. This Court also finds that Plaintiffs have made a sufficient showing that Defendants violated the wage-notice and wage-statement requirements of the NYLL.

As a threshold matter, Plaintiffs have sufficiently pleaded that Defendants were their "employers," alleging that Defendants "own, operate, and/or control" the restaurant at which Plaintiffs worked; that defendant Karalexis had operational control and/or an ownership interest in the Corporate Defendant and controlled Plaintiffs' work conditions; that Defendants' gross annual sales volume exceeded $500,000; and that Defendants engaged in interstate commerce.

(Compl. ¶¶ 2, 22-24, 37; *see also, e.g.*, *Banasiewicz v. Olympia Mech. Piping & Heating Corp.*, No. 10cv369 (SJ), 2012 WL 4472033, at *4 (E.D.N.Y. Aug. 31, 2012) (finding similar allegations sufficient to establish that defendants were "employers"), *report and recommendation adopted*, 2012 WL 4473074 (Sept. 26, 2012).) Such allegations are also sufficient to establish Defendants' joint and several liability. *See Zhang*, 2016 WL 4124304, at *1.

Plaintiffs' allegations, setting forth, for Salas and Benitez, their approximate hours and pay rate(s), are also sufficient to plead that neither Salas nor Benitez was paid the applicable minimum wage, and that Benitez worked in excess of 40 hours a week without overtime compensation. (*See* Compl. ¶¶ 63-64 (alleging that, during the period of his employment, Salas worked from approximately 11.5 to 17.25 hours per week, and was at all times paid $20.00 per day); *id.* ¶¶ 84, 86-87 (alleging that plaintiff Benitez worked for approximately 51 hours per week, and that, for all hours worked, he was not paid more than $5.65 per hour); *see also, e.g.*, *Banasiewicz*, 2012 WL 4472033, at *4 (finding similar allegations sufficient to establish minimum-wage and overtime violations).) Plaintiffs have also adequately pleaded that Defendants failed to pay Benitez the spread-of-hours pay required by the NYLL. (*See* Compl. ¶¶ 6, 84 (alleging that Defendants failed to pay "'spread of hours' pay for any day in which [Plaintiffs] had to work over 10 hours," and that plaintiff Benitez worked for approximately 12.5 hours straight, two days a week); *see also, e.g.*, *Cardozo v. Mango King Farmers Mkt. Corp.*, No. 14cv3314 (SJ) (RER), 2015 WL 5561033, at *5 (E.D.N.Y. Sept. 1, 2015) (finding similar allegation sufficient to establish NYLL "spread of hours" violation), *report and recommendation adopted*, 2015 WL 5561180 (Sept. 21, 2015).)

As for plaintiff Cabrera, the Complaint alleges that Cabrera only worked for approximately 27.5 hours per week for the duration of his employment (*see* Compl. ¶ 45), such that he would have no claim for unpaid overtime compensation. Further, a question arises as to whether Plaintiffs have sufficiently demonstrated that Defendants failed to pay Cabrera the applicable minimum wage. Unlike with respect to Salas and Benitez, the Complaint includes no specific allegation regarding Cabrera's pay rate to flesh out Plaintiffs' general allegation that all of the Plaintiffs were denied the applicable minimum wage. In the specific circumstances of this case, though, where Plaintiffs have included, with their motion, a Declaration from Cabrera, in which he states that, throughout his employment, he "received a fixed daily salary [sic] of $5 per hour" (Cabrera Decl. ¶ 13), this Court finds that Plaintiffs have adequately established that Defendants failed to pay Cabrera the applicable minimum wage, *see, e.g.*, *Herrera v. Tri-State Kitchen & Bath, Inc.*, No. 14cv1695 (ARR) (MDG), 2015 WL 1529653, at *5 (E.D.N.Y. Mar. 31, 2015) (adopting report and recommendation) (on motion for a default judgment, liability for overtime compensation sufficiently shown where complaint generally alleged that defendants failed to pay required overtime compensation but specifically alleged only that plaintiff "frequently worked five (5) to six (6) days a week," where plaintiff's supporting declaration clarified that plaintiff worked 54 hours per week). In these circumstances, "a finding of liability on default may be based on 'the factual allegations in the complaint, combined with uncontroverted documentary evidence submitted by plaintiffs.'" *Id.* at *5 n.1 (quoting *Bricklayers & Allied Craftworkers Local 2 v. Moulton Masonry & Const., LLC*, 779 F.3d 182, 189 (2d Cir. 2015)).

Finally, Plaintiffs have adequately pleaded that Defendants are liable to each Plaintiff for statutory wage-notice and wage-statement violations under the NYLL. (*See, e.g.*, Compl.

¶¶ 92-95 (alleging that Defendants never provided plaintiff Benitez with any wage statement or any statement otherwise accounting for his hours worked or his rate of pay, and never provided Benitez with any wage notice regarding his rate of pay or other statutorily required information); *see also, e.g.*, *Morales*, 2016 WL 4084159, at *7 ("Since all plaintiffs have . . . alleged without opposition that they were deprived of a wage notice . . ., regular wage statements, and annual wage notices, defendants are liable for those violations.").)

Accordingly, this Court will proceed to assess damages for each of the Plaintiffs.

B. Plaintiffs' Individual Claims

As a threshold matter, in the consideration of damages, this Court finds that Plaintiffs' submissions are sufficient to meet their burden of proof to establish, to a reasonable certainty, their applicable minimum wage, overtime, spread-of-hours, and statutory damages, such that a hearing here is not required. *See Fustok*, 873 F.2d at 40 (noting that the district court has the discretion to determine whether a hearing is necessary). As noted above, in the context of a default, where defendants have neither provided any employment records, nor otherwise rebutted plaintiffs' damages claims, it is sufficient for plaintiffs to rely on their "recollection alone" to establish the hours they worked and the rates they should have been paid. *Santillan*, 822 F. Supp. 2d at 294 (internal quotation marks and citations omitted). In this case, the well-pleaded factual allegations set out in the Complaint, which are accepted as true for purposes of Plaintiffs' motion, set out each Plaintiff's recollections regarding the hours he worked, and Salas's and Benitez's recollections regarding the rates of pay they earned. (Compl. ¶¶ 45, 63-64, 65, 84, 86-87.) Cabrera's recollection regarding the rate of pay he earned is provided in his Declaration. (Cabrera Decl. ¶ 13.) This Court finds that these submissions, together with the computations that Plaintiffs have provided in an included damages chart (*see* Androphy Decl., Ex. F (Dkt. 22-6)), are enough to enable the Court to assess damages.

This Court further finds Defendants' alleged violations of both the FLSA and the NYLL fall within these statutes' applicable statutes of limitations, as each Plaintiff's claimed period of employment commenced in 2014 (*see* Compl. ¶¶ 40, 58, 79), and Plaintiffs' Complaint was filed in 2015 (*see* Dkt. 1; *see also supra*, at n.4).

1. Plaintiff Cabrera

Cabrera asserts that he was employed by Defendants from approximately November 15, 2014 until approximately May 25, 2015. (Cabrera Decl. ¶ 4; *see also* Compl. ¶ 40.) He asserts that, throughout his employment, he worked about 5.5 hours per day (from about 5:00 p.m. to 10:30 p.m.), five days per week, for an estimated 27.5 hours per week. (Cabrera Decl. ¶ 9; Compl. ¶ 45.) He states that, throughout his employment, he "received a fixed daily salary [sic] of $5 per hour." (Cabrera Decl. ¶ 11.) He asserts that he was paid in cash, and received no statements or notices of his wages or hours. (*Id.* ¶¶ 12-16; Compl. ¶ 46, ¶¶ 51-54.)

As the minimum-wage requirements of the NYLL were higher than those of the FLSA during the time periods relevant to Cabrera's claim (and to those of the other Plaintiffs, as well), this Court will apply the NYLL in assessing each Plaintiff's claim for unpaid minimum wages, and will do the same for Benitez's claim for unpaid overtime compensation. (*See* Discussion, *supra*, at Section I(D).) This Court has reviewed the damages chart submitted by Plaintiffs with their motion, and concludes that the chart provides computations that reasonably estimate each Plaintiff's unpaid minimum wages and, where applicable, unpaid overtime compensation. The chart shows that Cabrera was underpaid (1) by $82.50 per week for approximately the first six weeks of his employment, calculated based on the then-applicable minimum wage of $8.00 per hour, and (2) by approximately $103.13 per week for approximately the remaining 21 weeks of his employment, calculated based on the then-applicable minimum wage of $8.75 per hour. (Dkt. 22-6.) Cabrera has thus adequately demonstrated that he is entitled to an award of $2,660.63 for unpaid minimum wages (calculated as $82.50/week x 6 weeks, plus $103.125/week[7] x 21 weeks).

Plaintiff's damages chart, however, overstates the liquidated damages that each Plaintiff may recover. Although conceding that they may only recover damages for unpaid minimum wages and overtime pay under the statute that provides the greatest relief (*see* Pl. Mem., at 5), Plaintiffs argue in their motion that Cabrera (and the other Plaintiffs) should be awarded "cumulative" liquidated damages, under both the FLSA and the NYLL (*see id.* at 6-7). Accordingly, Plaintiffs' damages chart calculates, for each Plaintiff, liquidated damages awards under both statutes (*see* Dkt. 22-6), and, as a corollary to this, Plaintiffs do not seek prejudgment interest on their unpaid minimum wages and overtime pay, as prejudgment interest is not available for any portion of damages on which FLSA liquidated damages are awarded (*see* Pl. Mem., at 8 n.1; *see also* Discussion, *supra*, at Section I(H)).

Plaintiffs' papers, filed on August 19, 2016, naturally do not address the Second Circuit's December 7, 2016 decision in *Chowdury*, 2016 WL 713854, at *1-2, and subsequent case law holding that cumulative liquidated damages are unavailable on unpaid wages accrued after April 9, 2011. (*See* Discussion, *supra*, at Section I(G).) Even without the benefit of the Second

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[7] Although Plaintiffs' damages chart displays $103.13 as the rounded weekly amount of underpayment during the second portion of Cabrera's employment, Plaintiffs' ultimate calculation of Cabrera's damages apparently uses the unrounded figure of $103.125. As Plaintiffs' calculation is only rendered more accurate by this practice, this Court takes no issue with the discrepancy. Plaintiffs have also engaged in this practice in making a few additional calculations, as noted herein.

Circuit's decision, though, Plaintiffs, in apparent acknowledgement of the previously-unsettled nature of the law, state that they "reserve the right to seek prejudgment interest" on their unpaid minimum wages and overtime pay, "[i]n the event that the Court does not awar[d] [cumulative] liquidated damages." (Pl. Mem., at 8 n.1) In keeping with the most recent authority (*see generally* Discussion, *supra*, at Section I(G)), this Court recommends an award of liquidated damages only under the NYLL, and thus will disregard Plaintiffs' FLSA liquidated damages calculations and make appropriate prejudgment interest calculations. With respect to Cabrera, as he is owed unpaid minimum wages under the NYLL of $2,660.63, he is also entitled, under the NYLL, to an equal amount in liquidated damages, bringing the total of his minimum-wage and liquidated damages to $5,321.26 (*i.e.*, $2,660.63 x 2).

As discussed above (*see* Discussion, *supra*, at Section I(H)), prejudgment interest under New York law is awarded at a rate of nine percent per annum, and may be calculated, in the Court's discretion, from an intermediate date, where damages were incurred at various times. As Plaintiffs' damages accrued somewhat variably due to a December 31, 2014 increase in the applicable minimum wage (and, for plaintiff Salas, due to a change in his work schedule, and for Benitez, due to a change in his actual pay) this Court will calculate prejudgment interest separately for each time period to which a particular minimum-wage requirement, work schedule, or actual pay rate applied. *Cf. Said v. SBS Elecs., Inc.*, No. 08cv3067 (RJD) (JO), 2010 WL 1265186, at *9 (E.D.N.Y. Feb. 24, 2010) (calculating interest on entire employment period, as "the amounts owed accrued at an essentially regular rate"), *report and recommendation adopted as modified on other grounds,* 2010 WL 1287080 (Mar. 31, 2010). Further, this Court will only calculate interest up to the date of Plaintiffs' motion, or August 19, 2016. As Plaintiffs would also be entitled to prejudgment interest up to the date of judgment, I recommend that additional prejudgment interest be awarded to each Plaintiff at the rate of nine percent per annum, to be calculated by the Clerk of the Court, from August 20, 2016 to the date final judgment is entered.

The relevant periods and calculations for prejudgment interest on Cabrera's minimum-wage damages are as follows:

Cabrera – Prejudgment Interest on Unpaid Minimum Wages					
From	**To**	**Median Date**	**Min. Wage Damages**	**Calculation (Principal x .09 x Years From Median Date To 8/19/2016)[8]**	**Interest Owed**
11/15/14	12/30/14	12/7/14	$495.00	$495.00 x .09 x (622/365)	$75.92
12/31/14	5/25/15	3/13/15	$1,299.38	$1,299.38 x .09 x (526/365)	$168.53
					Total: $244.45

Cabrera, like each of the other Plaintiffs, also seeks statutory damages for Defendants' failure to provide him with wage statements and wage notices, as required by the NYLL. Plaintiffs state that they are each "entitled to statutory damages in the maximum amount of $2,500 [for each violation], for a total of $5,000 per [P]laintiff" (Pl. Mem., at 8), overlooking the fact that the available penalties for wage-statement and wage-notice violations were not constant during the period at issue. As set out above, prior to February 27, 2015, statutory damages for violations of the NYLL's wage-statement requirement were capped at $100 per work week, up to a maximum of $2,500; these amounts were increased, as of that date, to $250 per work day, up to a maximum of $5,000. (*See* Discussion, *supra*, at Section I(F)(1).) Prior to February 27, 2015, statutory damages for violations of the NYLL's wage-notice requirement were capped at $50 per work week, up to a maximum of $2,500; these amounts were increased to $50 per work day, up

[8] The time in years, for this calculation, is calculated by dividing the total number of days from the relevant median date to the date of Plaintiff's motion by 365 days per year.

to a maximum of $5,000. (*See id.*) Accordingly, the relevant periods and calculations for Cabrera's statutory damages are as follows:

Cabrera – Statutory Damages				
Wage Statement Damages				
From	**To**	**Weeks or Days in Period**	**Calculation**	**Amount Owed (Up to Cap)**
11/15/14	2/26/15	15 weeks	15 weeks x $100 = $1,500	$1,500
2/27/15	5/25/15	88 days	88 days x $250 = $22,000	$3,500
Wage Notice Damages				
11/15/14	2/26/15	15 weeks	15 weeks x $50 = $750	$750
2/27/15	5/25/15	88 days	88 days x $50 = $4,400	$4,250
				Total: $10,000

In total, this Court recommends that Cabrera be awarded $15,321.26 in damages (representing $2,660.63 in unpaid minimum wages; $2,660.63 in liquidated damages; and $10,000 in statutory damages), plus $244.45 in prejudgment interest, calculated through August 19, 2016, with additional interest to be awarded as calculated by the Clerk of the Court, from August 20, 2016 to the date final judgment is entered.

2. Plaintiff Salas

Plaintiff Salas asserts that he was employed by Defendants from approximately September 23, 2014 until approximately July 28, 2015. (Salas Decl. ¶ 4; Compl. ¶ 58.) Again stating that all dates are approximate, Salas asserts that, from September 23, 2014 until January 2015, he worked about 5.75 hours per day (from about 5:00 p.m. until about 10:45 p.m.), three days per week, for an estimated 17.25 hours per week, and that, from January 2015 until July 28, 2015, he worked about 5.75 hours per day (from about 5:00 p.m. until about 10:45 p.m.), two days per week, for an estimated 11.5 hours per week. (Salas Decl. ¶¶ 9-10; Compl. ¶¶ 63-64.) He asserts that, throughout his employment, he was paid $20.00 per day. (Salas Decl. ¶ 12; Compl. ¶ 66.) Further, Salas states that he was paid in cash, and received no "document that stated [his] total number of hours worked or how [he] was paid," "with the exception of the last few weeks of [his] employment." (Salas Decl. ¶ 13.)

Having reviewed Plaintiff's submitted damage-chart calculations, this Court finds that they reasonably demonstrate that Salas was underpaid (1) by $78.00 per week for approximately the first 14 weeks of his employment, calculated based on the then-applicable minimum wage of $8.00 per hour, and (2) by approximately $60.63 per week for approximately the remaining 30 weeks of his employment, calculated based on the then-applicable minimum wage of $8.75 per hour, and taking into account a reduction in Salas's hours. (Dkt. 22-6.) Salas has thus adequately shown that he is entitled to an award of $2,910.75 for unpaid minimum wages (calculated as $78/week x 14 weeks, plus $60.625/week x 30 weeks).

Setting aside, for the reasons stated above, Plaintiffs' calculation of FLSA liquidated damages, Plaintiffs are at least correct that, based on his claimed unpaid minimum wages of $2,910.75, Salas is also entitled to an equal amount in liquidated damages under the NYLL (Dkt. 22-6), bringing the total of his minimum-wage and liquidated damages to $5,821.50 (*i.e.*, $2,910.75 x 2).

Having disregarded Plaintiffs' calculation of FLSA liquidated damages, this Court makes its own calculations for prejudgment interest on Salas's unpaid minimum wages. The relevant periods and calculations for that prejudgment interest are as follows:

Salas – Prejudgment Interest on Unpaid Minimum Wages					
From	**To**	**Median Date**	**Min. Wage Damages**	**Calculation (Principal x .09 x Years from Median Date to 8/19/2016)**	**Interest Owed**
9/23/14	12/30/14	11/10/14	$1,092.00	$1,092.00 x .09 x (649/365)	$174.75
12/31/14	7/28/15	4/14/15	$1,818.75	$1,818.75 x .09 x (494/365)	$221.54
					Total: $396.29

Salas also seeks statutory damages for Defendants' failure to provide him with wage statements and wage notices. As noted, Salas states that he received no "document that stated

[his] total number of hours worked or how [he] was paid," "*with the exception of the last few weeks of [his] employment.*" (Salas Decl. ¶ 13. (emphasis added).) Plaintiffs offer no further information that would allow this Court to determine specifically what type of information Defendants provided to Salas – whether a wage notice, or a wage statement – or when, precisely, Defendants began providing that information. As a reasonable convention, this Court, in calculating Salas's statutory damages, will exclude the last month of his employment. Accordingly, the relevant periods and calculations for Salas's statutory damages are as follows:

Salas – Statutory Damages				
Wage Statement Damages				
From	**To**	**Weeks or Days in Period**	**Calculation**	**Amount Owed (Up to Cap)**
9/23/14	2/26/15	22 weeks	22 wks x $100 = $2,200	$2,200
2/27/15	6/28/15	121 days	121 days x $250 = $30,250	$2,800
Wage Notice Damages				
9/23/14	2/26/15	22 weeks	22 wks x $50 = $1,100	$1,100
2/27/15	6/28/15	121 days	121 days x $50 = $6,050	$3,900
				Total: $10,000

In total, this Court recommends that Salas be awarded $15,821.50 in damages (representing $2,910.75 in unpaid minimum wages; $2,910.75 in liquidated damages; and $10,000 in statutory damages), plus $396.29 in prejudgment interest, calculated through August 19, 2016, with additional interest to be awarded as calculated by the Clerk of the Court, from August 20, 2016 to the date final judgment is entered.

3. Plaintiff Benitez

Plaintiff Benitez asserts that he was employed by Defendants from approximately November 15, 2014 until approximately August 22, 2015. (Benitez Decl. ¶ 4; Compl. ¶ 79.) Benitez asserts that, throughout his employment, he worked about 6.5 hours per day (from about 10:00 a.m. until about 4:30 p.m.), four days per week, and about 12.5 hours per day (from about 10:00 a.m. until about 10:30 p.m.), two days per week, for an estimated total of 51 hours per week. (Benitez Decl. ¶ 9; Compl. ¶ 84.) He further asserts that, from approximately November 15, 2014 until approximately August 8, 2015, he was paid $5 per hour, and that, from approximately August 8, 2015 until approximately August 22, 2015, he was paid $5.65 per hour. (Benitez Decl. ¶¶ 11-12; Compl. ¶¶ 86-87.) Benitez also states that he was paid in cash, and that, like Salas, he received no "document that stated [his] total number of hours worked or how [he] was paid," "with the exception of the last few weeks of [his] employment." (Benitez Decl. ¶ 13.)

Taking into account that Benitez was not only entitled to be paid minimum wages during his first 40 hours of work per week, but was also entitled to be paid overtime compensation for hours beyond that, Plaintiffs have reasonably demonstrated, in their submitted damages chart, that Benitez was underpaid (1) by $197 per week for approximately the first six weeks of his employment, calculated based on the then-applicable minimum wage of $8.00 per hour; (2) by approximately $239.38 per week for approximately the next 31 weeks of his employment, calculated based on the then-applicable minimum wage of $8.75 per hour; and (3) by approximately $206.23 per week for approximately the final two weeks of his employment, calculated based on the then-applicable minimum wage of $8.75 per hour, and taking into account an increase in the wages that he was actually paid during that time. (Dkt. 22-6.) Benitez has thus adequately shown that he is entitled to an award of $8,602.63 for unpaid minimum wages and overtime pay (calculated as $197/week x 6 weeks, plus $239.375/week x 31 weeks, plus $206.225/week x 2 weeks).

In addition, Benitez – alone among the Plaintiffs – has a claim for spread-of-hours damages. In this regard, he alleges that, throughout the duration of his employment, he worked for more than 10 hours per day, twice a week, without receiving spread-of-hours pay. (*See* Benitez Decl. ¶ 9; Compl. ¶ 84.) Accordingly, Plaintiffs claim that Benitez should have been paid (1) an additional $16 per week for approximately the first six weeks of his employment, calculated based on the then-applicable minimum wage of $8.00 per hour; and (2) an additional $17.50 per week for approximately (a) the next 31 weeks of his employment, and (b) the final two weeks of his employment, calculated based on the then-applicable minimum wage of $8.75 per hour.[9] Based on Benitez's stated hours per day and the applicable minimum wages, Plaintiffs' damages chart appropriately calculates that he is entitled to an additional award of $638.50 for spread-of-hours pay (calculated as $16/week x 6 weeks, plus $17.50/week x 31 weeks, plus $17.50/week x 2 weeks).

Setting aside, for the reasons stated above, Plaintiffs' calculation of FLSA liquidated damages, Plaintiffs are correct that, based on his unpaid minimum wages and overtime pay of $8,602.63, plus his unpaid spread-of-hours pay of $638.50 (together, $9,241.13), Benitez is also entitled to an equal amount in liquidated damages under the NYLL, for a total of $18,482.26 (*i.e.*, $9,241.13 x 2). (Dkt. 22-6.)

Having disregarded Plaintiffs' calculation of FLSA liquidated damages, this Court makes its own calculations for prejudgment interest on Benitez's unpaid minimum wages, overtime pay, and spread-of-hours pay. The relevant periods and calculations for that prejudgment interest are as follows:

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[9] In calculating Benitez's unpaid spread-of-hours pay, it is only necessary to divide Benitez's employment into two time periods, based on a change in the minimum wage. This Court has divided the latter of those periods into two sub-periods, so that the spread-of-hours pay calculation periods will track those used in calculating Benitez's unpaid minimum wages and overtime pay, which ultimately makes the task of measuring the prejudgment interest on Benitez's total damages more straightforward.

Benitez – Prejudgment Interest on Unpaid Minimum Wages, Overtime Pay, and Spread-of-Hours Pay					
From	**To**	**Median Date**	**Min. Wage, Overtime, & Spread-of-Hours Damages**	**Calculation (Principal x .09 x Years From Median Date To 8/19/2016)**	**Interest Owed**
11/15/14	12/30/14	12/7/14	$1,278.00	$1,278.00 x .09 x (622/365)	$196.01
12/31/14	8/8/15	4/20/15	$7,963.13	$7,963.13 x .09 x (488/365)	$958.19
8/9/15	8/22/15	8/15/15	$447.45	$447.45 x .09 x (371/365)	$40.93
					Total: $1,195.13

Benitez also seeks statutory damages for Defendants' failure to provide him with wage statements and wage notices. As noted, Benitez, like Salas, states that he received no "document that stated [his] total number of hours worked or how [he] was paid," "with the exception of the last few weeks of [his] employment." (Benitez Decl. ¶ 13.) As with its calculations for Salas, this Court will exclude the last month of Benitez's employment, in calculating Benitez's statutory damages for wage-statement and wage-notice violations, so as to provide a reasonable estimate of those damages. Accordingly, the relevant periods and calculations for Benitez's statutory damages are as follows:

Benitez – Statutory Damages				
Wage Statement Damages				
From	**To**	**Weeks or Days in Period**	**Calculation**	**Amount Owed (Up to Cap)**
11/15/14	2/26/15	15 wks	15 wks x $100 = $1,500	$1,500
2/27/15	7/22/15	146 days	146 days x $250 = $36,500	$3,500
Wage Notice Damages				
11/15/14	2/26/15	15 wks	15 wks x $50 = $750	$750
2/27/15	7/22/15	146 days	146 days x $50 = $7,300	$4,250
				Total: $10,000

In total, this Court recommends that Benitez be awarded $28,482.26 in damages (representing $9,241.13 in unpaid minimum wages, overtime pay, and spread-of-hours pay; $9,241.13 in liquidated damages; and $10,000 in statutory damages), plus $1,195.13 in prejudgment interest, calculated through August 19, 2016, with additional interest to be awarded as calculated by the Clerk of the Court, from August 20, 2016 to the date final judgment is entered.

C. ATTORNEYS' FEES AND COSTS

By their motion, Plaintiffs purportedly seek "costs and attorneys' fees" (Pl. Mem., at 1; *see also* Androphy Decl. ¶ 9 (stating that "the record supports an award to Plaintiffs of . . . costs and attorneys' fees"), but Plaintiffs include no supporting documentation, whatsoever, substantiating their claim for such an award. Indeed, Plaintiffs' papers do not even reference the amount of attorneys' fees and costs that they seek. Plaintiffs thus have failed to provide this Court with sufficient information to assess their fee application, *N.Y. State Ass'n for Retarded Children, Inc.*, 711 F.2d at 1148, let alone met their burden of demonstrating that the requested fees are reasonable, *see Blum*, 465 U.S. at 897. (*See generally* Discussion, *supra*, at I(J).)

This Court notes that Plaintiffs' counsel, the Faillace Firm, handles many FLSA and NYLL cases before this Court, and has often sought the imposition of damages upon defendants' defaults in such cases. In the past, the firm has apparently experienced little difficulty in providing this Court with at least a contemporaneous billing invoice substantiating requested attorneys' fees and costs. *See, e.g.*, *Rodriguez v. Obam Mgmt.*, No. 13cv463 (PGG) (DF), 2016 U.S. Dist. LEXIS 155315, at *77-86 (S.D.N.Y. Nov. 7, 2016) (amended report and recommendation) (discussing billing invoice substantiating fee application brought by the Faillace Firm); *Almanzar v. 1342 St. Nicholas Ave. Rest. Corp.*, No. 14cv7850 (VEC) (DF), 2016 U.S. Dist. LEXIS 155116, at *53-66 (S.D.N.Y. Nov. 7, 2016) (report and recommendation) (same). In fact, in *Flores*, the case related to this one, in which the Faillace Firm filed a motion for a default judgment simultaneously with its filing here, the Faillace Firm made a specific, and documented, request for fees and costs. Given Plaintiffs' failure to establish their reasonable attorneys' fees and costs in this case, as well as the fact that counsel's work in preparing the general allegations of the Complaint was obviously duplicative of the work performed in *Flores* and that Defendants never appeared to contest liability here, this Court recommends that attorneys' fees and costs not be awarded in this case, with the exception of the $400.00 filing fee that is evident from the Docket. (*See* Dkt. 1.)

CONCLUSION

Based on the foregoing, I respectfully recommend that, based on the defaults of the Corporate Defendant and Karalexis, judgment be entered against them in the following amounts:

A. For plaintiff Cabrera:

1. $15,321.26 in damages (representing $2,660.63 in unpaid wages, $2,660.63 in liquidated damages, and $10,000 in statutory damages); and

2. $244.45 in prejudgment interest through August 19, 2016, with additional prejudgment interest, on the principal amount of $2,905.08, to be calculated by the Clerk of Court at the rate of nine percent per annum from August 20, 2016 to the date of entry of final judgment, in accordance with C.P.L.R. § 5002;

B. For plaintiff Salas:

1. $15,821.50 in damages (representing $2,910.75 in unpaid wages, $2,910.75 in liquidated damages, and $10,000 in statutory damages); and

2. $396.29 in prejudgment interest through August 19, 2016, with additional prejudgment interest, on the principal amount of $3,307.04, to be calculated by the Clerk of Court at the rate of nine percent per annum from August 20, 2016 to the date of entry of final judgment, in accordance with C.P.L.R. § 5002;

C. For plaintiff Benitez:

1. $28,482.26 in damages (representing $9,241.13 in unpaid wages, $9,241.13 in liquidated damages, and $10,000 in statutory damages); and

2. $1,195.13 in prejudgment interest through August 19, 2016, with additional prejudgment interest, on the principal amount of $10,436.26, to be calculated by the Clerk of Court at the rate of nine percent per annum from August 20, 2016 to the date of entry of final judgment, in accordance with C.P.L.R. § 5002; and

D. $400.00 in costs, for the filing fee paid to commence this action.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Thomas P. Griesa, United States Courthouse, 500 Pearl Street, Room 1630, New York, New York 10007, and to the chambers of the undersigned, United States Courthouse, 500 Pearl Street, Room 1660, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Griesa. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988); *McCarthy v. Manson*, 714 F.2d 234, 237-38 (2d Cir. 1983).

If defendant Karalexis does not have access to cases cited herein that are reported only on Lexis or Westlaw, she may request copies from Plaintiffs' counsel. *See* Local Civ. R. 7.2 ("Upon request, counsel shall provide the *pro se* litigant with copies of [cases and other authorities that are unpublished or reported exclusively on computerized databases that are] cited in a decision of the Court and were not previously cited by any party[.]").

Dated: New York, New York
March 6, 2017

Respectfully submitted,

DEBRA FREEMAN
United States Magistrate Judge

Copies to:

Plaintiffs' counsel (via ECF)

Ms. Kalli Karalexis
19-42 75th Street
Queens, NY 11370